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CURRENT TOPICS.

In *Citizens Life Association v. Nugent*, 11 Vroom, 225, it was held by the Supreme Court of New Jersey that a bond stipulating for the good conduct of an officer for a fixed term and until another is appointed, will not remain in force after the reappointment of the original officer. The bond in this case stipulated for the good behavior of the officer, "until the said association or the directors thereof should elect another treasurer." The defendants in their plea alleged that the office was an annual one, and that Nugent, the treasurer, at the time the bond was given, had been elected for one year, and that he was re-elected in the succeeding year, and they averred performance during the first year. A demurrer to this plea was overruled, the Chief Justice saying: "All the decisions on this subject proceed upon the basis that it is the admitted rule that the sureties on an official bond of an officer, whose appointment is annual, will not be bound for delinquencies committed after the first year, although such officer be continued in his position, and although the obligation in the condition is for the good behavior of the officer, without restriction as to time. Mayor of Rahway v. Crowell, 11 Vroom, 207; Ludlow v. Simond, 2 Caines Cases 1; Amherst Bank v. Root, 2 Met. 536. In Welch v Seymour, 28 Conn. 387, the words of the statute were: 'The said officers shall continue in office until the next annual election, and until *others* are elected in their stead;" and it was adjudged that the word "others" did not necessarily mean different persons. See also Commissioners v. Greenwood, 1 Dessau. 452. The natural and reasonable supposition is, that when a man goes surety for the good conduct of a person elected to an office for a definite term, he intends to stand bound for that term alone, and words conspicuously plain should not be required to carry over such obligation to an indeterminate period, possibly extending over the entire lifetime of the official. I know of no case in which such amplitude of responsibility has been thrown upon a surety, except when the the terms of the obligation would admit of no other result. In the present instance, I do not find in the language above cited any such imperative force."

In the case of *Readman v. Conway*, argued at the March Term, 1878, of the Massachusetts Supreme Judicial Court, the defendants were the owners of a building, consisting of three shops or tenements, standing forty feet back from the line of the street, and having a wooden platform extending from it to the line of the sidewalk of the street. They made oral leases of these shops, each to a separate tenant. The platform had no fences or lines of any kind separating the parts thereof in front of the several shops from each other, but was entirely open, so that persons passed over it in any direction, in going to either of the shops. The plaintiff, while in the exercise of due care, was injured by a defect in the platform, for which the person whose duty it was to keep it in repair was responsible. The evidence was conflicting upon whether by the terms of the leases, the landlords were to keep in repair the whole of the platform, or each tenant was to keep in repair the part in front of his shop. In this state of the case the defendants asked the court to instruct the jury as follows: 1st. "In the absence of an express agreement, on the part of the landlord to do repairs, the tenant is bound in law to keep the tenement in repair; and he, not the landlord, is responsible for any injury arising from the want of repair. 2. The occupier and not the landlord is bound, as between himself and the public, so far to keep buildings and adjoining structures abutting upon highways in repair, that they may be safe for the use of travellers therein, and that *prima facie*, such occupier is liable to third persons for damages arising from such defect." In the opinion of the full court, delivered by MORTON, J., it was said: "These requests state general propositions of law, which in many cases might be correct and sufficient. But in the case at bar, the principal question in dispute was whether the tenants of the shops were tenants or occupiers of the platform within the meaning of these rules of law. There was evidence which would

justify the jury in finding that the platforms were not leased to the several tenants, but that the understanding was that they were constructed, and were to be kept open and controlled by the landlords for the common use of the occupants of all the shops and of the public. If they so found, the tenants would not be liable for defects in the platform, but the responsibility therefore would remain upon the landlords. Kirby v. Boylston Market Association, 14 Gray 244; Milford v. Holbrook, 9 Allen 17; Shipley v. Fifty Associates, 101 Mass. 251. The presiding justice properly declined to give the instructions requested without qualification or explanation."

In the United States Circuit Court for the Eastern District of Michigan, in the recent case of *Wolff v. Connecticut Mutual Life Ins. Co.*, the question of suicide as evidence of insanity was considered by BROWN, J. In an able opinion the learned judge held that, although neither an act of suicide nor an attempt nor a a threat to commit suicide, standing alone, creates a presumption of insanity sufficient to justify a jury in finding a party insane, such an act may properly be considered in connection with the previous demeanor and conduct of the party as an item of testimony tending to prove insanity. In Terry v. Ins. Co., 1 Dill. 403, and Coverston v. Conn. Mut. Life Ins. Co., 3 Ins. L. J. 113, it is stated, "there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity." In Moore v. Conn. Mut. Life Ins. Co., 3 Ins. L. J. 444, Judge Longyear says, "the fact of suicide is not, in itself, evidence of insanity." In McClure v. Mut. Life Ins. Co., 3 Ins. L. J. 221, it is said by the N. Y. Court of Appeals, "Insanity cannot be presumed from the mere commission of this act." The question was fully and ably discussed in Coffee v. Home Life Ins. Co., 35 New York Superior Court, 314. The court upon the trial at *nisi prius* charged that "the law cannot and does not presume that a man in the full possession of his mental faculties, in that normal condition of mind which we call sanity, will deliberately take his own life; and, therefore, so far as there is any presumption, it favors insanity at the time of committing an act of self-destruction. I therefore charge you, as matter of law, that as affecting this case, you must presume that the deceased when he took his life was not in a sound state of mind." This was held to be error, and Chief Justice Barbour, in delivering the opinion, observes: "The most that can be said is, that inasmuch as many, and perhaps most persons who destroy their own lives, are insane at the time, the fact of such self-destruction of itself wholly removes the presumption of sanity." Sedgwick, J., in concurring, also remarks that a judge, as such, cannot determine whether an individual case of suicide is the result of insanity. See also Brooks v. Barrett, 7 Pick. 94; Pettit v. Pettit, 4 Humph. 191; Burrows v. Burrows, 1 Hagg. Ecc. 109; Duffield v. Robinson, 2 Harr. 375; Chambers v. Queen's Proctor, 2 Curt. 415; People v. Francis, 38 Cal. 183; Staples v. Harrington, 58 Me. 459, 460; Field v. Hall, 2 Abb. U. S. 514; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; Carpenter v. Carpenter, 8 Bush. 283; 2 Greenl. Ev. 689; Charter Oak Life Ins. Co. v. Rodel, 6 Cent. L. J. 54.

INNOVATIONS UPON THE LAW OF EVIDENCE.

II.—THE FURTHER DISCUSSION OF THE SUBJECT OF PAROL TESTIMONY TO VARY A WRITING, AND ITS APPLICATION TO CONTRACTS IN ANOTHER DIRECTION.

In a former article (*ante* p. 162), we discussed the subject of innovations upon the elementary rule forbidding contemporaneous parol agreements to vary written instruments as applicable especially to conditions contained in the body of a policy of insurance. But there is a still more marked, radical and far-reaching innovation upon the same rule, in its relation to written applications for insurance, and other written statements made the bases of contracts. It is doubtless true that the class of worthy citizens who solicit insurance and other contracts, and who have been much traduced and made the subject of many a ribald jest in modern times, like men in other professions or pursuits, are often over-solicitous to effect their object and earn their commissions; and many times, perhaps, they are

not sufficiently careful as to the manner in which their applications in cases of special hazards in fire insurance and in life insurance and the like, are filled and signed. But it does not therefore follow that the foundations of the law should be disturbed to prevent a hardship. Surrounded as the underwriters are with unfriendly legislation, and loaded as they are with popular odium they rarely, if ever, resort to litigation, or seek advantage of those cunningly devised conditions about which much is said in the courts, except in cases of suspected fraud or bad faith.

But to the point under consideration. We stated in our former article that as to the waiver of a condition in a policy by parol at the time of its execution, the Supreme Court refused to write an opinion. But subsequently in 1871 that high court, in a case involving the same question in principle, but under facts involving its application in the class of cases under discussion here, committed itself to the same doubtful doctrine discussed in our former article. The case referred to is Insurance Company v. Wilkinson, 13 Wall. 222. That was an action upon a life policy, and a defense was based upon the alleged untruthful statement in answer to a question in a paper signed by the applicant, and warranted by the terms of the policy to be true. The answer had been prepared by the agent of the company upon information obtained from others than the assured and the deceased, who professed to know nothing about the facts stated in the answer, which turned out to be untrue, but both signed the application containing the same. It was held, that notwithstanding the breach of the warranty in the policy by the falsity of the statements in the application, the company were liable.

The opinion is by Mr. Justice Miller, than whom few judges of any court are more able. His reasoning upon the point under discussion here, can only be fairly represented by copying it from the opinion. And it is only fair to say that the presentation of the point, is both specious and ingenious. After stating the manner in which the question is presented by the record, the opinion proceeds:

"The great value of the rule of evidence here invoked, cannot be easily overestimated. As a means of protecting those who are honest, accurate and prudent in making their contracts against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters, the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake or fraud, the principle has been long recognized, that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence, adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle, that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him."

It will be observed that the ruling in this case recognizes the general principle and its reasons as stated in our former paper, but at the same time assumes that in a trial at law contrary to the construction of the rule, the court may, without any application for reformation, upon the principle of estoppel *in pais*, introduce parol proof to vary the written contract of the parties. This is virtually introducing into the law of evidence a radical exception. This exception might be thus stated: The contract of the parties once being reduced to writing, the writing is the sole conclusive and binding evidence of the contract, and unless reformed by a court of equity, cannot be controlled, varied or changed by any parol proof of matters occurring before, or cotemporaneously with its execution; *provided, however*, that where, by fraud, accident or mistake, the parties have failed to express their meaning in the writing, and where it would be a fraud to permit the party instrumental in framing the writing, so as not to express the intention of the parties, to enforce the same, then the rule will be relaxed and an exception introduced, which shall permit the parties by parol to vary the writing and show the real intent of the parties, thus virtually giving the parties to a written instrument in every action at law the right to vary the terms of the same upon certain conditions. In this view, no necessity need arise for resort to a court of equity for reformation. We are aware that neither this case nor those following it, nor

others which sanction a like doctrine, go to this extent in terms, but the ruling leads to this result inevitably.

The argument quoted by Mr. Justice Miller from the reasoning of the judges in cases where the construction of the statutes of frauds has been controlled by courts of equity, to prevent their being used as instruments of fraud, has much of sentiment but little of sound principle in it. For if the court is permitted to disregard the statutes whenever it might operate as a fraud to enforce them, they would soon be abolished altogether. For it may be safely said that the statute of frauds is rarely interposed except in the very face of the *higher ideas* of commercial integrity. This has been realized by the courts, and the encroachments upon these statutes upon such considerations have long since been discontinued, and the ablest judges have regretted that they ever began. The same may be said here in answer to this apparently specious argument. Chancellor Kent, 1 Johns. Ch. 131-146; Brown on the Statute of Frauds, § 493, citing Lord Macclesfield.

The case under discussion is partially sustained by the four cases cited, but two of them (Plum v. Cattaraugus Ins. Co., 18 N. Y. 392, and Rowly v. Empire Ins. Co., 36 Id. 550), are of no great force as authority, the former being decided by a divided court, and both of them being virtually overruled in Le Roy v. Market Fire Ins. Co., 45 N. Y. 80. The other two cases, Combs v. Hannibal Savings and Ins. Co., 43 Mo. 148, and Woodbury Savings Bank v. Charter Oak Ins. Co., 31 Conn. 518, like the other two, were actions on fire policies, and the former holds that where the facts are truly given, but not truly written in the application, though signed by the assured, the falsity of the statement, though a breach of the condition of the policy by its terms, is not available by the company as a defense to the action. The latter case relates solely to the power of the agent in the completion of the contract.

All these cases trench upon the rule under discussion, and one of the vices of the entrenchment is, that little regard is had in this line of decisions as to whether the particular case is one wherein a court of equity could, under its rules, reform the contract. It is assumed by the court, in Insurance Company v. Wilkinson, that the application would be reformed in equity, and we do not controvert it, and are not inclined to examine it with that view, because such an examination is not germane to this discussion.

If it be asked why the shorter remedy by parol proof at the trial, is not preferable to the more tedious one of reformation, we answer: 1. The modern innovation upon the rule of evidence has been extended beyond the equity rule. Indeed, many of the cases where parol testimony has been allowed, have been cases where reformation could not be had in equity. 2. The methods of equity proceeding for reformation are better guarded and better adapted to the right administration of justice· 3. The relaxation of the rule produces uncertainty. A rule should never outlast the reasons; nor should it be abolished or refined upon, or relaxed, while the reasons for its enforcement are so potent as those stated by Mr. Justice Miller, above, and are not only not diminishing, but increasing, as we have seen, in a rapid ratio. An exception to a general rule of law, like the one under consideration, once established, is hard to keep within bounds, and the inconvenience, and vexatious litigation necessary to fix a definite boundary, is simply incalculable. And more is lost in this way, than is gained by obviating a case of hardship, now and then, by the introduction and enforcement of the exception

This innovation is far-reaching; it is not confined to insurance contracts, but is met in all manner of contracts wherein conditions are introduced. The results of the innovation are most pernicious in practice. A party attempting to enforce a contract where the breach of a condition is set up as a defense, without reformation, without formal allegation of fraud, accident or mistake relied on, but such averments only as, under the loose rulings in modern practice, will show some unfairness in the enforcement of the condition seeks to be discharged from the condition. He is his own witness. He swears to a parol waiver of the condition at the time the writing was executed, and the defendant contradicts him; if the condition seem to the jury unfair, if the defendant be unpopular, a foreign corporation, for instance, the jury soon see a preponderance for the plaintiff, notwithstanding his parol testimony is a fabrication. These suggestions are not imaginary,

they are real; indeed it is the rarest thing imaginable to see a defense based upon the breach of a condition in a written instrument, where there is not some effort, under the modern relaxations of the rules of evidence, to obtain, by parol proof, some relief from the rigor of the condition.

The courts have fluctuated greatly in reference to the relaxation of the rule of evidence under discussion. In New York, the court of appeals overrules itself periodically, but calls it "*distinguishing*," and thereby occupies a large space in the overruled cases; it would be hard to tell what position it now occupies; the last reported cases seem to favor the innovation.

The Supreme Court of Michigan is also refining by denying the principle announced in Insurance Co. v. Hall, examined in our former article. In Hartford Fire Ins. Co. v. Davenport, 36 Mich. 609, where at the time a fire policy was issued which contained a condition rendering it void in case the house became vacant, the assured told the agent that he expected to leave his house vacant a year or more, during the term for which the policy extended, and where the house became vacant and while so was burned, it was held that the company was not liable, and that parol proof discharging the assured from keeping the condition of the policy was incompetent. An attempt is made to *distinguish* the case from that of Insurance Co. v. Hall, upon the ground that the waiver to be proved by parol was executory.

Let us examine for a moment the soundness of this distinction; for illustration, suppose at the time of issuing the policy and the payment of the premium, the assured says the house is vacant, and will remain so a week, to which the insurer assents, and within the week the house burns; the agreement can be proved because it was the representation of a fact, and may be the basis of an estoppel. But if he say the house is occupied, but will be vacated to-morrow and remain so a month, and within the time it burns, the fact of the representation and contract, cannot be proved by parol, because the waiver of the breach is in the latter case executory. Apply the same rule to the case of the powder; the condition of the policy forbids powder being kept; the assured says there *is* powder in the stock. The assurer answers, let it remain; the stock burns, and the court allows parol proof of the waiver of the breach. But if the assured say to the insurer, "I always keep powder in my stock, but I am out to-day, but I shall have a supply to-morrow, and expect to keep it all the time the policy runs," and the underwriter answers, "it is well, you can do so," and the stock burns with the powder in it, the courts say the policy is avoided, and the waiver of the condition cannot be proved by parol, because the breach waived was *executory*. What benefit is to result from introducing an exception to a rule of evidence so well settled, and so highly prized, even by the very judges who would thus disturb its uniformity, which depends for its maintainence upon distinctions so shadowy? And does not the necessity for such illogical distinctions for the maintainance of the exception prove its total impolicy?

In another paper it is proposed to consider still another exception to the general rule under discussion, which though not as well defined as the one already considered, is quite as pernicious.

ASA IGLEHART.

MUNICIPAL CORPORATIONS—CHANGE OF GRADE OF STREET—DAMAGE TO ABUTTING LOTS.

CITY OF AKRON v. CHAMBERLAIN CO.

Supreme Court of Ohio, December Term, 1878.

1. THE OWNER OF A LOT ABUTTING on an unimproved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities, if made within the reasonable exercise of their power.

2. THE LIABILITY OF A MUNICIPALITY for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or where the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade.

3. WHETHER A GRADE BE UNREASONABLE or not must be determined by the circumstances existing at the time the grade was established, and not by the circumstances existing at the time abutting lots may have been improved.

4. WITHIN THE PRINCIPLE OF MUNICIPAL LIABILITY, as above stated, is the case where a lot is improved in anticipation of, and with reference to a rea-

sonable future grade which is afterwards established, and damage results from a subsequent change in the grade.

ERROR to the District Court of Summit county.

The original action was instituted in the Probate Court of Summit county, by the city of Akron, against the Chamberlain Company, a corporation, and others, under the statute (§ 566 of the Municipal Code), for the purpose of having the damages sustained by the defendants, by reason of the improvement of West Market street, assessed by a jury.

The Chamberlain Company was the owner of a flouring mill, erected on a lot abutting on the street, and the damages sustained resulted from an elevation of the grade, about 14 feet in front of the mill. The mill had been erected in the year 1842, and the grade of the street was raised in 1876, under an ordinance passed in 1873. Testimony was offered tending, among other things, to prove that the mill had been erected before the grade of the street had been established, and also tending to prove that in 1844 the municipal authorities had established a grade suitable for the convenient use of the mill, and that the improvement of the street in 1876 was a change in the established grade, which resulted in injury to the mill. Testimony was also offered tending to show that no grade had been established in 1844, as claimed by the company.

The jury assessed the company's damages at $9,600, for which judgment was rendered. This judgment was afterwards affirmed in the common pleas and district courts. The errors complained of are assigned upon the charge of the probate court to the jury, and the refusal to charge as requested.

MCILVAINE, J., delivered the opinion of the court:

We adhere, with entire satisfaction, to the doctrines enunciated in Cincinnati v. Penny, 21 Ohio St. 499, wherein the former cases, decided by this court, in relation to the liability of municipal corporations for damages to adjacent proprietors, by reason of the improvement of streets, were approved.

In that case, while the liability of the municipality was acknowledged in cases where adjacent proprietors make improvements on the faith of corporate acts whereby they are induced to believe that no future change in the street will be made, it was affirmed that such owners must improve, at their peril, where the wants of the public, as to the improvement of a street, have, in no way, been indicated or defined by the public authorities.

But inasmuch as the decision in the case of Crawford v. Delaware, 7 Ohio St. 459, was approved in Cincinnati v. Penny, it appears that some doubt has arisen as to the true rule. The doubt arises thus: A proposition in the syllabus of Crawford's case is: "That when a grade has not been established, the owner of a lot must use *reasonable care and judgment* in making improvements or erecting buildings, with a view to a reasonable and proper grade, and the city will not be responsible for injuries to such improvements, by afterwards grading the street, if the grade by ordinary care could have been anticipated." This proposition must be true, if the lot owner in such case improves at his peril. It is not on this proposition, however, that the doubt arises; but on a supposed implication; namely, that if the owner *uses reasonable care and judgment*, and is nevertheless injured by subsequent grading, the municipality will be responsible, although the grade subsequently established, be a reasonable one. Such implication, if it arises, is, of course, repelled by the decision in Cincinnati v. Penny.

But it does not necessarily arise, as will be seen by an examination of the case then before the court. The case was not one for the application of such a doctrine. We do not understand, however, that it was the intention of the court, or of the learned judge who wrote the opinion, to hold that the test of liability, in the supposed case, is the reasonableness of the care and judgment exercised by the lot owner instead of the reasonableness of the subsequent grade of the street. But, however that may be, we are now unanimously of the opinion, that if the subsequent grade, in such case, be reasonable, or in other words, if it be established in the reasonable exercise of the authority conferred on the municipality at the time it is made, then such grade should have been anticipated by the owner of the adjacent lot, and his improvements should have been made with reference thereto. Whatever latitude there may be in the exercise of discretion in fixing the grade of a street, is lodged in the municipal authorities, and not in the adjacent lot owners.

While we recognize the general rule to be that no liability on the part of the municipality for injury to abutting property by reason of the improvement of a street exists where such improvement is properly made; yet this rule is subject, as we have seen, to the exception, that where abutting property is improved with reference to an existing street so graded or improved under the authority of the public agents having the contract thereof, as to indicate, fairly and reasonably, permanency in the character of the street improvement, a liability is cast upon the city or village for injuries resulting from subsequent changes. And it would seem to follow, as a logical sequence, that if before a permanent grade is thus established, the owner of an abutting lot improves the same with reference to a reasonable grade to be established in the future, and his anticipations are realized in the subsequent establishment of the grade, he should thereafter, in respect to such improvement, be entitled to enjoy the same right in the grade of the street which was thus fairly and reasonably anticipated, as if he had improved his lot after the grade had been so established. Surely the rights of such a lot owner are equal to those of one who improves his lot after the grade was established.

But while we find the doctrine of liability on the part of the municipality, as maintained in this State, fairly stated in the charge of the probate court, we think the rule of non-liability was not well or clearly put to the jury; especially in a case,

where abutting lots are improved before the grade of the street has been established, and the buildings thereon are afterwards injured by a *reasonable* grade subsequently established.

We have had some difficulty in determining the sense, in some instances, in which the words "grade" and "grade established," were used in the charge of the court below; but without referring to instances more particularly, it is enough to say, that we are of opinion that the establishment of a grade whereby lot-owners are justified in assuming that no change will be made in the grade of a street, and may, therefore, improve their lots with reference to its present condition, so that the municipality will be liable for injuries to their improvements resulting from a subsequent change of the grade, does not necessarily require the passage of an ordinance or other legislative action; but it may be shown by the nature of the improvement on the surface of the street under the direction or sanction of the proper authorities, whether in accordance with an ordained grade line or not; but otherwise, if the surface improvement indicates a mere temporary use or condition of the street.

The plaintiff in error requested the court to charge as follows: "There being no claim made by the claimant of damages in this case that any part of their lands have been taken, and damages being claimed solely on account of a *change* of grade, the plaintiffs can not recover damages for injury to any part of their property built upon, unless such buildings were built, *after* a grade was *actually* established by the town or city authorities in accordance with such grade, or that such buildings, if constructed before a grade was established, were constructed with reference to a reasonable grade, and that the city by establishing an unreasonable grade has caused the injury complained of."

While this request might properly have been refused on the ground that it omitted the case where a reasonable grade which had been afterward established, was anticipated by the claimant as damages; it was nevertheless given with this qualification; "I give you this as law except the concluding paragraph, that the city, by establishing an unreasonable grade, has caused the injury complained of. I say to you that it is not necessary for you to find that the present grade is an unreasonable one for the present time in order that the plaintiff may recover."

This qualification was calculated to mislead the jury in respect to the risk which the owner assumed in improving his lot before the grade of the street was established. He was bound to anticipate the future grade of the street in accordance with the future wants of the public. The question is not what would have been a reasonable grade at the time the lot was improved; but was the first grade, indicating permanency, reasonable at the time it was established? The liability of the municipality would attach only when such grade was unreasonable, or if reasonable, by subsequently changing it to the injury of adjacent buildings.

The plaintiff in error also requested the court to charge as follows: "The law presumes, and the jury will presume, that the grade established and the acts done by the city council were legally established and done, and that the grade established and improvements made were reasonable, until the contrary appears." Which request was given, the court adding thereto the following charge: "That what was a reasonable grade in 1873 might not have been a reasonable grade in 1844. What would be a reasonable grade in a village of two thousand inhabitants, might not be a reasonable grade for a city of fifteen thousand inhabitants. If the plaintiff built in 1842 in reference to what would have been a reasonable grade then, and such grade was established, his right to recover would not be determined by the fact that the present grade is, or is not, an unreasonable one."

Admitting the last clause of this instruction to be a correct statement of the law, we think the whole instruction was misleading, Suppose that "what would have been a reasonable grade" in 1842, had not been afterward established, and the jury had found the grade of 1873 to be the first grade established, then they might well have understood from the instruction that the city was liable, if they further found that the grade of 1873 would have been unreasonable in 1842, and thus the abutting proprietor would be relieved from the risk of anticipating a future reasonable grade under the general rule without bringing himself within the exception which has been recognized in this State.

Judgment reversed and cause remanded.

SALVAGE ON WESTERN RIVERS — COMPENSATION.

MATTINGLY v. 357 BALES OF COTTON.

United States Circuit Court, Western District of Tennessee, November Term, 1878.

1. SALVAGE—RULE FOR ALLOWANCE OF.—Where a steam tug on the Mississippi river rendered a salvage service by towing a vessel laden with cotton away from another vessel, which was being consumed by fire, it requiring from five to ten minutes time to remove the former vessel from the imminent danger, and thirty minutes to tow her to a place of safety, the property thus saved being 223 bales of cotton: *Held*, that one-third of the value of the cotton would be an excessive and exorbitant allowance to the owners of the tug as salvors; and $750 was allowed in this case.

2. RULE ON HIGH SEAS NOT APPLIED ON RIVERS.—The rule of salvage compensation, adopted in cases arising on the high seas, can not safely be followed in cases arising on the western rivers, because the peril of life is generally much less.

APPEAL from the district court:

J. M. Gregory, for libelant; *T. B. Turley* and *H. C. Warinner*, for claimant.

The material facts are as follows: The steamboat Mary Bell, a large vessel, was discovered to be on fire about two o'clock P. M. of the 27th day of February, 1876, while she was lying at the levee

of the port of Vicksburg, Mississippi. She was taking on a cargo of cotton, her head being to the shore and her stern extending out into the Mississippi river at an angle of about forty-five degrees. On her larboard side, and to some extent caught under her guards, was the small steamboat Yazoo Belle, partially laden with cotton; and on her starboard side and next to the levee, but having sufficient room to be turned around, was the small steamboat Tallahatchie, likewise partially laden with cotton, which last named cotton was that involved in this litigation. The flames on the Mary Bell spread quite rapidly, and in this condition of affairs, and in response to the whistle of the Mary Bell for assistance, the steam-tug John Bigley, which was then some half mile distant, steamed to the place of disaster, with the crew at the time on board, to render such assistance as might be needed. The tug first made fast to the Yazoo Bell, she being in more immediate danger from the fact that the wind blowing off shore carried the flames in her direction, and towed her out of reach of the peril. The tug then returned as soon as possible, and having made fast to the Tallahatchie, likewise towed her to a safe place, first below, and afterwards above, the burning steamboat. This tug was the only steamer in port that could have rendered such assistance at the time; and the strong probabilities were that the Tallahatchie, as well as the Yazoo Belle, with their remaining cargoes, would have been destroyed, but for this service. Other parties were attempting to move the Tallahatchie to another position, and had moved her slightly, but with no great prospect of ultimate success. The time actually consumed in towing the Tallahatchie away from the fire was from five to ten minutes; and together with the time consumed in removing her to a position above the burning steamboat, aggregated about a half hour. While aid was being rendered to the Yazoo Belle, the original crew of the tug was joined by two others of the crew, who were off watch at the time, also by one of the owners, and by one or more persons belonging to the crews of the Yazoo Belle and Tallahatchie, and they all equally participated in the remaining service, the crew of the tug, all the time during its rendition, not being required to leave their vessel. The owners of the tug and her regular crew are the libelants in this suit, and seek a salvage compensation. Some of the libelants' witnesses testified that the tug, in rendering this assistance to the Tallahatchie and cargo, was exposed to danger, because of the proximity of the burning steamboat; and that the lives of those on board of the tug were likewise imperilled by the heat, by danger from exploding steampipes, and by risks from the probable falling of the chimneys, and also of the side-houses of the Mary Bell, which in fact fell soon after the Tallahatchie was towed away; but they consider that the tug might, at any moment, have quickly steamed away from the place of disaster.

The cotton on board the Tallahatchie, which had come out of the Yazoo river, was consigned in part to Memphis, Tennessee, and in part to New Orleans, Louisiana. That consigned to Memphis was, after the fire, reshipped at Vicksburg for Memphis on the steamboat Capitol City, without objection by the salvors; but upon its arrival at Memphis, it was arrested in this cause, and was soon afterwards released on bond, it having been claimed by the Hernando Insurance Company and Planters' Insurance Company, both of Memphis, Tennessee, with small lots by other persons. The libelants dismissed their suit as to one hundred and nineteen bales of cotton, which was shown by claimants' proof not to have been on board the Tallahatchie at the time of the service; and this left two hundred and twenty-three bales to be adjudicated upon, out of the three hundred and forty-two bales actually seized under the warrant of arrest.

Upon the hearing of the cause in the district court the libelants were awarded salvage at the rate of ten and seventy-nine one hundredths dollars per bale, the agreed value of the cotton being thirty-two and fifty one hundredths dollars per bale, which allowance, with interest on the amount, made the decree of the district court two thousand six hundred and eighty-six and eighty-five one hundredths dollars, against such of the cotton as was held liable. The cotton so held liable was the portion of the original cargo, which had been claimed and bonded by the Hernando Ins. Co. and the Planters' Ins. Co., by reason of the insurance risks they had therein; and therefore a personal decree was rendered against each of the claimants, and their sureties, for their respective proportions of the aggregate salvage awarded, together with the costs taxable, on said two hundred and twenty-three bales of cotton. The decree recites that the allowance made is based upon a like compensation voluntarily paid to libelants by the New Orleans Board of Underwriters, for the rescue of their cotton on board of the Yazoo Belle and Tallahatchie, and saved at the same time with the Memphis cotton. The New Orleans Underwriters paid forty-five hundred dollars for the saving of four hundred and seventeen bales, and did so voluntarily, though under circumstances not necessary to mention.

BAXTER, J.:

The claimants have appealed to this court and here complain of the decree below as awarding an excessive compensation in salvage. I cannot concur with the district court in the amount allowed. Upon the statement of the case as presented by the proctor for libelants, I think the sum of seven hundred and fifty dollars most ample compensation in the way of salvage. Indeed, I think five hundred dollars would be liberal; but I fix it at seven hundred and fifty dollars to cover interest. There is no doubt in my mind but that, if libelants had been called upon to do the work at a stated price, they would have gladly undertaken it for one hundred dollars. Their own proof shows that the ordinary compensation charged by the tug for towage was ten dollars per hour. I cannot consent to adopt the rule, which seems to have grown up among some of the courts, exercising maritime jurisdiction over the western rivers, of allowing such large awards of salvage.

The learned counsel for the libelants insists that

upon the principles laid down in the text-books, and under the precedents established, the amount allowed below, being about one-third the value of the cotton, is not excessive. I cannot adopt this view. In former years such services as these, requiring but little time and labor, were rendered by steamboats on the rivers as acts of courtesy to each other, without any demand for compensation. But beyond this "in salvage claims arising on the Western rivers, the precedents of courts administering the admiralty law of the ocean in regard to the *amount* of compensation, cannot be safely adopted, because the peril of life is generally much less." Str. Pontiac, 5 McLean 359-368. This principle I most cordially approve; and while it may be true that in the multiplicity of courts and judges having salvage causes before them, some of them have been disposed to adopt and apply in large degree the theory of compensation recognized in ocean salvage, still, for myself, I am wholly unwilling to countenance or continue such extreme liberality in the exercise of my judicial discretion. In this circuit over which I am required to preside, and so long as I occupy my present position, I shall be careful to guard the property of suitors, whether they be insurance companies or general owners, against what seem to me to be excessive or extortionate demands; and in the expression of the judicial discretion vested in me under the law, I shall make for this circuit such precedents in the matter of salvage allowance as seem to me just and proper according to the circumstances of each case.

There are no facts presented in this record justifying a larger allowance than that I have fixed. The danger or peril to the tug and her crew, alleged in behalf of the salvors, and mentioned in their testimony, was more fanciful than real, and could, at any moment, have been withdrawn from and escaped. The time occupied in the rendition of the service was very short, and these elements, taken in connection with the other circumstances surrounding the transaction, lead me to the conclusion that the allowance of the gross sum of seven hundred and fifty dollars instead of a pro rata per bale, or on the entire value of the property saved, is the proper amount to be awarded as salvage in this cause. But I adjudge this amount free of all costs, and direct the whole of the costs in the district court and in this court to be taxed against the claimants.

The decree of the district court is therefore reversed and modified, as indicated in this opinion, and the decree will be entered accordingly.

DAVID DUDLEY FIELD, in a recent lecture, said that the total amount of money paid yearly for public service in the city of New York was $10,540,000, or about $10.50 for every man, woman and child in the city. There were a large number of Federal officers in the city, and with the State officers and notaries, referees and commissioners, there were altogether about 20,000, or one to every fifteen persons. The judiciary department is paid more than in England or in France—the inferior judges at least.

SCINTILLA OF EVIDENCE — FINDING OF FACTS NOT REVIEWABLE ON ERROR— MENTAL DERANGEMENT.

CONELY v. McDONALD.

Supreme Court of Michigan, January, 1879.

1. INTERROGATORIES MUST NOT BE so framed as to allow the deponent to express opinions based on hearsay.

2. WHERE THERE IS ONLY a *scintilla* of evidence on any essential fact, the case should be taken from the jury.

3. WHERE THE EVIDENCE has a legal tendency to make out a proper case in all its parts, its weight and sufficiency, however slight, is a question for the jury alone.

4. WHERE A JURY'S FINDING of an essential fact is wholly unsupported by evidence, it is erroneous as matter of law, but where it is supported by any evidence, however slight, it is a finding of fact, and can not be reviewed on writ of error.

5. FACTS TENDING TO SHOW TESTAMENTARY incapacity are admissible, even if they antedate the making of the will; the difference of time only affects their weight, which is for the jury to determine.

6. SUDDEN IRRITABILITY, MOROSENESS, and unprovoked profanity, indicating a complete and radical change of disposition, may be shown, in connection with other facts, as tending to prove mental derangement.

7. COSTS OF PROCEEDINGS to establish the validity of a will as against one previously executed are awarded against the estate and not against the proponent, when the latter has been designated by the court to represent the parties interested.

ERROR to Wayne.

Appeal from an order of the probate court admitting to probate an instrument purporting to be the last will of Firth A. McDonald. The plaintiff in error was named as executor in this instrument, and was designated by the probate court as the representative on the appeal, of all the parties interested. The circuit court directed the framing of an issue, and the plaintiff in error appeared as proponent of the instrument, and alleged that it was the last will and testament of Firth A. McDonald, and that at the time of its execution he possessed the necessary lawful qualifications to its due execution by him. The appellant and contestant, who was the widow of McDonald, pleaded the general issue with notice that she would show that the instrument relied on was not her husband's last will; that its execution was obtained by fraud and undue influence of Joel McDonald and others; that Firth A. McDonald was of unsound mind and memory when he signed and executed it, and that its provisions were contrary to the just and legal rights of the appellant. The jury found that the instrument propounded was not the last will and testament of Firth A. McDonald, and it was so adjudged. The proponent Conely brought error.

Maybury & Conely, *Fred. A. Baker* and *Ashley*

Pond, for plaintiff in error; *Chas. B. Howell*, *C. I. Walker* and *J. Logan Chipman*, for defendant in error, cited as to testamentary capacity, Kempsey v. McGinniss, 21 Mich. 141; Parish Will Case, 25 N. Y. 105; 1 Redf. on Wills, 126, and criticised the rule that a case ought not to be submitted to the jury unless there is evidence that ought reasonably to satisfy it that the fact sought to be proved is established, referring to Wittkowsky v. Wasson, 71 N. C. 451; Improvement Co. v. Munson, 14 Wall. 448; and to Ryder v. Wombwell, Pleasants v. Fant, Com. v. Clark, and Ins. Co. v. Rodell, reviewed in the opinion. Marked changes in temper, disposition and character may indicate insanity. Redfield on Wills, 67-69.

MARSTON, J., delivered the opinion of the court:

Under the issue as framed in this case, evidence tending to show undue influence was competent and admissible in evidence. The court in charging the jury, being of opinion that upon this branch the testimony did not tend to show undue influence, withdrew that question from their consideration.

The answer of the witness, Frances A. Eastbrook, to the twenty-seventh interrogatory* was properly excluded. The interrogatory as framed permitted her to base her opinion in part upon what she had heard within a given time. This it is claimed, from the form of the question, could only mean and be understood by her as to what she had heard deceased say. The question is not so limited, and she clearly may have understood it in a different sense. Where a party insists upon an answer to an interrogatory he must see that it is not susceptible of a construction which would enable the witness in answer thereto, to testify concerning matters clearly incompetent, or as in this case to express an opinion, based upon hearsay evidence, the nature or character of which would be wholly unknown.

After the evidence was all in, counsel for proponent requested the court to instruct tne jury, 1st., "There is no evidence in the case tending to show that the testator when he executed the will in controversy was in any respect of unsound mind, and the jury are therefore bound to assume that he was fully competent to make such a will." 2d. "Upon the whole case the verdict must be for the proponent." These requests were refused, and to the charge as given no exceptions were taken.

It was not seriously disputed on the argument, but that there was testimony in the case tending to show that the testator did not have sufficient capacity to make the will in question. It was, however, urged very strenuously that there was not sufficient evidence, all of which is returned, to sustain the verdict in this case, and consequently that the second above request to charge should have been given.

We had supposed that the law was well settled in this State as to the duty of the court under such circumstances. It is true the question may not have been discussed at length, and the authorities bearing thereon cited in any one particular case, but the question has frequently been referred to and acted upon in cases where perhaps, at least in some of them, it was of minor importance. As the question is one of importance in this case, and has been ably argued, and authorities cited, more especially the decisions of the English courts and of the Supreme Court of the United States, it may be well to consider the matter at some length and see what the true rule is or should be in all such cases, and in the light thereof determine the controversy in this case. In England the rule is laid down that a *scintilla* of evidence clearly would not justify the judge in leaving the case to the jury; that there must be evidence on which they might reasonably and properly conclude that the issue was proven. See Ryder v. Wombwell, Law Rep., 4 Exch. 38, where many of the cases are collected and citations therefrom given.

When we turn to the decisions of the United States Supreme Court, it would seem at first view as though the rule there laid down was not uniform, especially as between some of the later and earlier cases. As, however, the earlier cases are cited in support of those later, we think there was no intention to overrule the former, which certainly were very clear upon this question. A brief reference to some of them may be permitted.

In Pleasants v. Fant, 22 Wall. 122, the true principle was said to be "that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." In Commissioners v. Clark, 94 U. S. 284, following the English rule, it was said a *scintilla* would not be sufficient; that "before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In Schuchardt v. Allens, 1 Wall. 369, it was said, "A circuit court has 'no authority to order a peremptory non-suit against the will of the plaintiff.' Where there is no dispute about facts, and the law arising upon them is conclusive against the right of the plaintiff to recover, it is proper for the court so to instruct the jury. If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. 'This is equivalent to a demurrer to the evidence, and such an instruction ought to be given whenever

*The twenty-seventh interrogatory was as follows: "Taking into consideration his appearance, his manner, his actions, his conversation with yourself and with others, and from everything else you saw or observed of him, or heard between his arrival from California and his leaving for Detroit, state what at this time was, in your opinion, the mental condition of Firth A. Mcdonald, sound or unsound?"

The response of the witness in her deposition, was "Sound."

The interrogatory was objected to on the ground that it called for an opinion not only from what the witness herself saw and heard, but from what she heard from others.

The objection was sustained and exception was taken to the ruling.

the evidence is not legally sufficient to serve as the foundation of a verdict for the plaintiff.' This practice 'has in many of the States superseded the ancient practice of a demurrer to evidence. It answers the same purpose and should be tested by the same rules. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom.'"

In Drakely v. Gregg, 8 Wall. 268, Mr. Justice Davis said: "The only question with which we have to deal at the present time is, whether the evidence in this record *tended* to prove the position assumed by the plaintiffs in error; for if it did, the learned court should either have submitted the evidence on this point to the consideration of the jury, or if, in the opinion of the court, there were no material extraneous facts bearing on this question, and the contract relied on must be determined by the commercial correspondence alone, then to have interpreted this correspondence and informed the jury whether or not it proved the contract to be of the character contended for by the plaintiffs in error." The evidence in this case consisted of a voluminous correspondence, and some parol proof explanatory of the conduct of the parties, and the duty of the court in reference to a construction of the written correspondence, and of the jury as to the extraneous facts were clearly distinguished.

In Hickman v. Jones, 9 Wall. 201, the court instructed the jury to acquit the defendants. Mr. Justice Swayne said: "There was some evidence against both of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury under the instructions of the court. The learned judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts —and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law."

In Insurance Co. v. Rodel, 95 U. S. 238, Mr. Justice Bradley said: "It is hardly necessary to say that, if there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death, the judge was not bound to, and indeed could not properly, take the evidence from the jury. The weight of the evidence is for them, and not for the judge, to pass upon. The judge may express his opinion on the subject, and in cases where the jury are likely to be influenced by their prejudices, it is well for him to do so; but it is entirely in his discretion."

Assuming that the English rule as already stated, which was followed and approved in Commissioners v. Clark, 94 U. S. 284, means just what is said, that a *scintilla* of evidence would not justify the judge in leaving the case to the jury, I can fully concur therein. Such a rule would be no more than what has repeatedly been followed in this State. In Kelly v. Hendrie, 26 Mich. 256, it was said: "If, upon any point essential to a recovery, the evidence bearing on it is open to but one meaning, and that meaning is plainly and necessarily adverse to the plaintiff, then he has no ground of complaint" if the court takes the case from the jury. There may be a "*scintilla*," in other words, a "spark" or "the least particle" of evidence in a case, and yet fall far short of what is essential. It frequently happens on the trial of a cause that proof of one fact has of itself a tendency to prove others which are material and necessary to establish the cause of action, while in other cases each fact is so separate and distinct that proof of one raises no presumption whatever in support of another.

As was said in Perrott v. Shearer, 17 Mich. 54, whether evidence bearing upon a certain point tends to establish it or not, may depend not alone upon that particular item of evidence, but upon that considered in its relation to other evidence which may so far qualify and explain it that it shall have no tendency whatever to prove the position for which it was offered, and which if it were the sole evidence in the case it might appear to establish. The duty to examine, weigh and compare in these cases is not entrusted to the judge; these are matters lying within the peculiar province of the jury.

In Gaines v, Betts, 2 Doug. (Mich.) 98, it was held that a judgment should not be reversed on the ground that the verdict of the jury was against evidence, unless it appeared there was a total want of testimony to sustain the finding.

In Berry v. Lowe, 10 Mich. 15, where the question came up upon writ of error, it was said: "If the alleged error is a total want of evidence to prove some fact necessary to sustain the judgment, the court will look into the testimony to see whether there was such evidence or not. If there was, it will not weigh it, or inquire into its sufficiency, but affirm the judgment. If the return shows no such evidence, and it appears all the testimony before the justice has been returned, the judgment will be reversed on the ground that the justice erred, in law, in rendering the judgment he did without such evidence." Or, as was said in Hyde v. Nelson, 11 Mich. 357, where the ques-

tion came up on *certiorari:* "It is only when there is an entire absence of proof upon some material fact found, that such finding becomes erroneous as a matter of law."

The doctrine laid down in these cases has always been strictly adhered to in this State. In addition to the cases already cited, see Blackwood v. Brown, 32 Mich. 107, and authorities there referred to; Maas v. White, 37 Mich. 130, and Elliott v. Van Buren, 33 Mich. 52, where it was said to be "not in the province of an appellate court to consider of the amount of the verdict, or the weight of the evidence. The court of trial may set aside a verdict which violates justice, and it is to that tribunal that parties must apply for relief against excessive damages or any other of the wrongs for which it may be right to grant a new trial. We are bound in all cases to assume that the jury have done no legal wrong when acting within their province."

It seems to me that this is the only safe rule. Under our system of jurisprudence, the jury is called to pass upon the facts.

It is not only their privilege but their right to judge of the sufficiency of the evidence introduced to establish any one or more facts in the case on trial. The credibility of witnesses, the strength of their testimony, its tendency and the proper weight to be given it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given. The jury should be left entirely free to act according to their own judgment. Where there is a total defect of evidence as to any essential fact, or a spark, the least particle, a *scintilla*, as it is termed, the case should be withdrawn from the consideration of the jury. Where, however, the evidence introduced has a legal tendency to make out a proper case in all its parts, then, although it may in the opinion of the trial court or the appellate court be slight, inconclusive, and far from satisfactory, yet it should be submitted to the jury, whose proper province it is to consider and determine its tendency and weight.

When there is a total want of evidence upon some essential fact, but the jury nevertheless find such fact, the finding is erroneous as matter of law, but when there is slight evidence in support thereof a finding thereon would be one of fact, upon which men might differ in opinion, but for a court to attempt the correction thereof upon writ of error would be but a correction of errors in fact and not in law, a power which this court does not possess.

As already said, it was conceded on the argument that there was some testimony given in this case tending to prove the issue. True it referred to a period some time prior to the time of making the will, yet that did not render it incompetent, but rather went to the effect, or weight and importance to be attached to it. It was proper to be considered by the jury with all the other evidence introduced in the case bearing upon that question. Much other testimony was introduced—testimony that was clearly admissible as bearing upon the issue made. It was argued, however, that much of it had no tendency whatever to support the issue; that the irritable disposition and profane language used by the testator did not tend to prove incapacity. There are many people who habitually indulge in the use of profane language, and should they abstain therefrom for any definite length of time, it would be considered as something remarkable indeed, while there are others of a mild, gentlemanly disposition, who were never heard to utter a profane word or supposed by any to harbor an unclean thought. Should such an one become irritable, morose, and addicted to the use of profane language, and especially at times and on occasions when no cause or provocation had been given, would not such a change be considered passing strange indeed, and might it not when considered in the light of other circumstances, indicate quite clearly a deranged state of mind?

All these things were proper arguments to be addressed to and considered by the jury. The same facts which might in one case tend to prove insanity might in another have no such tendency, and no court could lay down or would attempt to lay down a rule that should govern all such cases, as to what did or did not tend to prove insanity.

We are of opinion that there was evidence in this case which tended to prove the issue made. The weight and effect thereof was rightly left to the jury under proper instructions, and their finding we have no power to review.

The proceedings must be affirmed. The cause, however, was properly brought into this court, and the costs should be paid out of the estate in all the courts. It must be certified accordingly to the circuit and probate courts.

The other justices concur.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MISSOURI.

October Term, 1878.

[Filed December 23, 1878.]

AGENCY—SALE BY SAMPLE BY AGENT DOES NOT AUTHORIZE PAYMENT BY PURCHASER TO AGENT, IN ABSENCE OF AUTHORITY OF AGENT TO RECEIVE PAYMENT. — Defendant purchased a bill of goods of plaintiff through their traveling agent, who sold by sample, on four months' time. The agent was not intrusted with possession of the goods, and was restricted by terms of employment from recovering for goods sold. Six days after sale defendant paid to the agent a part of the purchase-money, and when the bill became due paid to plaintiff balance, and refused to pay the amount already paid to agent. This action was for recovery of such balance, and defendant had judgment. *Held*, that where the principal has clothed his agent with the *indicia* of authority to receive payment, as by intrusting him with possession of the goods to be sold, the purchaser is warranted in paying the price to the agent; but when the agent has not possession of the goods, or other *indicia* of authority and is only authorized to sell, if the purchaser pays

the price to the agent he does so at his peril, and it devolves upon him, in a suit for the purchase price by the principal, to prove that the agent was also authorized to receive payment. A declaration by the court that authority to receive payment might be implied from the authority to sell was incorrect. Seiph v. Irvin, 30 Penn. St. 513; Law v. Stokes, 32 N. J. (Law), 249. Reversed and remanded. Opinion by HENRY, J.—*Butler v. Dorman.*

RESULTING TRUSTS—CONVEYANCE BY INSOLVENT HUSBAND TO WIFE OF LANDS PURCHASED IN HIS NAME WITH SEPARATE ESTATE OF WIFE NOT IN FRAUD OF CREDITORS.—This was an equitable proceeding to set aside conveyance of land made by defendant to a trustee for benefit of defendant's wife. The evidence was conflicting, and the court below decreed for defendant. It appeared that the land in controversy was entered by defendant in his own name with money belonging to wife's separate estate, and patent issued to defendant. Afterwards, and when defendant was greatly embarrassed in his pecuniary circumstances, defendant executed the deed to trustee. *Held*, that as the money used to enter the land was that of wife's separate estate, it was defendant's duty to transfer the land thus acquired to a trustee for his wife's benefit, and the fact that he was embarrassed at the time of the transfer in nowise changed his duty in the premises, a duty which demanded that the trust fund committed to his care should not be divested from its originally intended purpose, a matter with which his creditors had no concern whatever. Affirmed. Opinion by SHERWOOD, C. J.—*Payne v. Twyman.*

ADMINISTRATION — WIDOW'S RIGHT TO ALLOWANCE IN PERSONAL ESTATE OF DECEASED HUSBAND MUST BE CLAIMED BEFORE DISTRIBUTION.—Plaintiff, as widow of her intestate husband, deceased, administered upon his estate, and received proceeds of sale of personal estate, which, upon her re-marriage, she paid over on settlement to the administrator *de bonis non*, who, in 1871, applied the sum thus received to payment of classified debts. Afwards the administrator *de bon. non*, in due course of administration, sold real estate, from the proceeds whereof there remained, after payment of all debts, about $700. The widow, prior to her settlement with the county court, had received, under sec. 35, p. 88, 1 Wag. Stat. 228, personal property, and this suit was instituted against administrator *de bon. non* by her, and her present husband, in 1874, to obtain residue of $400 allowed her under said sec. 35, in which they had judgment. *Held*, that the right of the widow in such cases is purely statutory, and she must apply for such allowance before the personal property shall have been distributed or sold, otherwise her claim must be separate. 1 Wag. Stat. p. 88, secs. 36, 37. Nor is her *status* altered, or in the least bettered, because the administrator has a surplus of money in his hands arising from the sale of real estate. That money belongs to the heirs, and she having failed to make application in the time she was told by the law to apply, can not now make her loss good in violation of the statute, and of the vested rights of others. Reversed and remanded. Opinion by SHERWOOD, C. J.—*Drowry v. Bauer.*

SUPREME COURT OF KANSAS.

January Term, 1879.

DISMISSAL OF ACTION—COUNTERCLAIM.—An action to foreclose a mortgage may be dismissed without prejudice to a future action, before the case is called for trial, notwithstanding the defendant has filed an answer amounting to a counterclaim, but such defendant has the right of proceeding to the trial of his claim, regardless of the dismissal. Opinion by HORTON, C. J. Affirmed. All the justices concurring.—*Amos v. H. L. Association.*

ATTACHMENT—POSSESSION.—1. A person in actual possession of real estate under an unrecorded deed is, as against all persons who have actual notice of such deed, the legal and absolute owner of such real estate, and, as against all other persons, he is the equitable owner. 2. All persons are bound to take notice of all equitable interests which any person may have in real estate of which he is in actual possession. 3. An attachment can not be made to operate upon a merely legal title, as against the equitable owner of real estate, where the parties claiming under the attachment have (at the time the attachment is levied), or are bound by law to take notice of the paramount outstanding equitable title. Opinion by VALENTINE, J. Affirmed. All the justices concurring.—*Tucker v. Vandermark.*

SUMMONS — SURETY — VERIFICATION. — 1. A summons directed to the sheriff of the county in which the action is brought, is not void or voidable because made returnable in two days. Clough v. McDonald, 18 Kas. 114. 2. An action may be maintained against the surety in a recognizance alone, and without joining the principal as defendant. Jenks v. School District. 18 Kas. 356. 3. Where an answer tendered out of time is not verified, and there is no showing by affidavit or otherwise that the matters set forth in the answer are true, and where the party, though not served, filed a motion to set aside the summons, which was overruled, and thereafter a demurrer, which was also overruled: *Held*, that no error appears in refusing to grant leave to file the answer. Neitzel v. Hunter, 10 Kas. 221. 4. Interest begins to run on a recognizance from the time of forfeiture. Opinion by BREWER, J. Affirmed. All the justices concurring.—*Swendsfeger v. State.*

VERDICT—AFFIDAVITS OF JURORS.—1. Where five of the jurors who tried a cause made an affidavit discrediting their verdict, and afterwards one of such jurors made another affidavit stating that he did not understand when he made his first affidavit that he discredited the verdict, and also stating that what he and the other four jurors stated in said first affidavit was not true; and afterwards five others of the jurors who tried said cause made an affidavit stating that what was stated in the first affidavit was not true, and stating that the verdict was fairly found after due deliberation and discussion, and the court below sustained the verdict: *Held* (without deciding whether said affidavits were properly received or not), that the preponderance of the evidence was in favor of the verdict and that the ruling of the court below sustaining the verdict will be affirmed. 2. Where the jury, after deliberating upon what their verdict should be, agreed that each juror should mark what he believed it should be, and each juror did so mark—some marking a large amount for the plaintiff, some a small amount, and others nothing, and then they added all the several sums so marked together and divided the aggregate amount by twelve, but at no time did they agree that the result of such marking, aggregation and division should be their verdict; but afterwards, and upon due deliberation and consultation, they agreed upon a different amount which they returned as their verdict, and the court below sustained such verdict: *Held*, that the ruling of the court below sustaining said verdict must be affirmed. Opinion by VALENTINE, J. Affirmed. All the justices concurring.—*Bailey v. Beck.*

PRACTICE IN SUPREME COURT—LIBEL.—1. A case

is brought to the supreme court on a petition in error and case made for the supreme court. Such case made shows upon its face that the case was settled and signed by the judge of the court below five days before the time had arrived for so settling and signing such case; and the case made does not show whether the case was ever served upon the opposite party or his attorney had any notice thereof, or whether the opposite party or his attorney was present at the time when such case was settled and signed; but evidence was introduced in the supreme court satisfactorily showing that the case was properly served upon the attorney of record of the opposite party, who then said it was "all right," and who was afterwards present when the case was settled and signed and made no objection thereto: *Held*, that such case will be treated as a valid case made for the supreme court. 2. The defendant, Daniel R. Anthony, published in a newspaper called the Leavenworth *Daily Times*, an article concerning the plaintiff, Edward Russell, which article contains, among other things, the following: "Who is Ed. Russell, in whose eyes swindling is no crime? He is secretary of the bankrupt Kansas Insurance Company. Less than two years ago he was State commissioner of insurance, and certified under his oath of office that this bankrupt concern was a sound and solvent insurance company, while he knew it was at that very time hopelessly bankrupt. He was forced to leave the office of commissioner of insurance because the Leavenworth *Times* exposed his official 'crookedness,' and compelled him to disgorge eight thousand dollars of the State's money." The words "State commissioner of insurance," as used in said article, were intended and understood to mean the office of "superintendent of insurance" for the insurance department of the State of Kansas. *Held*, that said article, if false, and if published without any sufficient excuse, is libelous, and that it will be presumed to be false, and published without any sufficient excuse until the contrary is shown, and that the burden of proving the contrary rests upon the defendant. And it makes no difference that the plaintiff had left the office of superintendent of insurance and was not in office when the article was published; nor does it make any difference that the plaintiff alleged in his petition, in addition to what was necessary to be alleged, that said article charged him with committing the crimes of perjury and embezzlement, when in fact it did not so appear. Opinion by VALENTINE, J. Reversed. All the justices concurring.—*Russell v. Anthony.*

PARTNERS—FORECLOSURE OF MORTGAGE.—H and M as partners owned certain personal and real property M, by a written contract, sold all his interest therein to to H, H agreeing to pay therefor all the partnership debts and $1,500 to M. H took immediate and exclusive possession of all the property, and M abandoned the same. H then mortgaged the real estate to Z, and to secure a partnership debt. Afterwards Z obtained a judgment against H on the mortgage and for the said debt and for the sale of the mortgaged property to pay said debt. Afterwards S became the owner of said judgment and all Z's interest therein. Afterwards S, in order to preserve his own lien on said mortgaged property, paid certain taxes thereon, which taxes were a lien thereon. *Held*, that although the legal title to said mortgaged property may have been and may still be in H and M conjointly, yet, that H when he mortgaged said property, was the undoubted equitable owner thereof; that he had a right to mortgage the same to secure the payment of said partnership debt, and that the plaintiff, S, may now have judgment against both H and M, decreeing that said mortgaged property be sold to pay said partnership debt, and also to pay said taxes. Opinion by VALENTINE, J. Reversed. Horton, C. J., concurring.—*Seamen v. Huffaker.*

PRINCIPAL AND SURETY—EVIDENCE.—1. In an action against the principal and surety on a joint and several obligation, an admission or declaration of the principal, after there has been a breach of the contract on which the surety is liable, is not admissible against the surety, as a recovery may be had in the action against the principal alone, or against both. 2. Where L was to act as agent of B & Co., to sell goods and merchandise placed by them in his possession, and H, J & C signed a written obligation with L, conditioned that if L should well and truly do all things in and about the management of the said business honorably and faithfully and account for all the goods and merchandise delivered to him and return the goods and merchandise to B & Co. when demanded, and pay all differences, should any occur, with twelve per cent. interest from the time of demand the said obligation to be void, and thereafter in an action against L and his sureties upon the said undertaking, the trial court admitted the declarations of L concerning his disposition of property and indebtedness to B & Co. after the property had been sold and the proceeds converted by L to his own use, and after repeated demands: *Held*, error, as such subsequent declarations had no direct connection with his preceding acts so as to bind his sureties. Opinion by HORTON, C. J. Modified. All the justices concurring.—*Lee v. Brown.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January, 1879.

MARRIED WOMAN—CONTRACT MADE IN ANOTHER STATE.—A contract made in another State by a married woman residing here, which a married woman is allowed by the law of that State to make, but is not under the law of this Commonwealth capable of making, will sustain an action against her in our courts. Opinion by GRAY, C. J.—*Millikin v. Pratt.*

INDICTMENT— PLEA IN BAR— COMPLAINT. — The defendant, who was indicted in the superior court for larceny, filed a plea in bar alleging that a complaint for the same offense had been made against him in the municipal court, which was subsequently dismissed. To this the government demurred, and the court sustained the demurrer. *Held*, that such ruling was correct. The effect of dismissing a complaint without a trial is like that of quashing or entering a *nolle pros.* of an indictment. By neither of these is the defendant acquitted of the offense charged against him, but is only exempted from liability on that complaint or indictment. Opinion by MORTON, J.—*Com. v. Bressant.*

DEMAND — CONVERSION— MITIGATION OF DAMAGES.—1. It is not necessary to constitute a good demand that the interest should be computed and added to the principal sum. Jones v. Richardson, 10 Met. 481. 2. When the plaintiff in making his demand claimed less interest than that which was due him by virtue of the mortgage under which he claimed, it was *held* that the demand was not thereby invalidated. 3. When an officer is sued by a mortgagee of personal property for a conversion by attaching the same, and has failed to restore the property to him within the time limited by the statute, or to pay the amount due upon the mortgage on demand, evidence of a subsequent restoration is not admissible in mitigation of damages. See Forbes v. Parker, 16 Pick. 472; Howe v. Bartlett, 8 Allen, 20; Alden v. Lincoln, 13 Met. 204. Opinion by COLT, J.—*Robinson v. Sprague,*

DIVORCE—INTOXICATION—EVIDENCE.—The statute which makes gross and confirmed habits of intoxication a ground of divorce, does not undertake to define these terms; and where the evidence showed that for a period of twelve or fifteen years the libellee had as often as three or four times a year yielded to an impulse to drink to excess; that on such occasions he became grossly intoxicated, continuing in that condition a week or ten days; that at such times he was sent or went to the inebriate asylum; that when the desire for drink came upon him he could not resist, and that a single glass would bring on excessive drinking; and that no improvement had been shown: *Held*, that the judge was justified in finding the charge in the libel to be true. Opinion by AMES, J.—*Blaney v. Blaney.*

TRUSTEE — LIABILITY FOR INVESTING TRUST FUNDS.—The English rule which requires trustees to invest in public funds only has never been recognized here; and where the trustee invested in railroad bonds and in a promissory note of an individual secured by a pledge of twice its amount of such bonds, it appearing that the roads were in the management of men who possessed in a high degree the confidence of the community for integrity and business ability, and that the bonds were regarded as a first-class investment, and were purchased by persons of reputed good judgment for permanent investment: *Held*, that the trustee acted with the sound discretion which the law required of him; and that neither the fact that the railroad was outside the Commonwealth, nor the fact that the money applied in this investment was derived from the sale of bonds of the United States, was sufficient to control the effect of the other facts reported. Opinion by GRAY, C. J.—*Brown v. French.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, January 25, 1879.]

MECHANICS' LIEN— MATERIALS FURNISHED FOR CURBING, GRADING AND PAVING STREET IN FRONT OF LOT.—This was a petition under the mechanics' lien law to establish a lien on the premises described for materials and labor furnished and performed under a contract with the owner for "curbing, grading and paving" the street in front of the lot owned by defendant. Petition alleges that defendants "promised, contracted and agreed" that petitioner might have a lien on the premises described, which is on an abutting lot. Demurrer interposed, which was sustained and bill dismissed. SCOTT, J., says: "There was no error in dismissing the petition. The statute has by no express terms given any lien in such cases, and we have no right by judicial construction to enlarge its provisions. Under the statute upon which suit is brought, the contract must be with the owner of the property, and must be for the 'building, altering, repairing or ornamenting of any house or other building or appurtenance thereto on such lot, or upon any street or alley' before the mechanics or material men can have a lien upon the premises for their labor or materials furnished. What is meant by the phrase 'upon any street or alley' may not be readily understood, but it is clear that the petition in this case does not show the labor and materials furnished were for the 'building, altering, repairing or ornamenting any house or other building or appurtenance thereto,' but the same were for work in 'curbing, grading and paving' the street—a work wholly disconnected with the buildings, if there was any on the lot against which the lien is sought." Affirmed.—*Smith v. Kennedy.*

ASSUMPSIT—IMPLIED CONTRACT—STATUTE OF LIMITATIONS— WHEN IT BEGINS TO RUN ON IMPLIED CONTRACT.—This was an action of assumpsit brought by plaintiff to recover of defendant for cast and wrought iron work delivered for a building which defendant had undertaken to erect. The declaration contains only the common counts, to which defendant pleaded the general issue and the statute of limitations. Plaintiff claims that he had an express contract with defendant. The latter denies this. A large quantity of iron was furnished for the building but not all called for by the contract when the building was destroyed by fire on the 9th day of October, 1871. SCOTT, J., says: "The evidence is so conflicting that the court was not warranted in believing that any iron work for any purpose was in fact delivered about the first of October previously to the destruction of the building. This action was not commenced until the 25th of September, 1876, and a period of more than five years having elapsed since the delivery of any of the iron work, it seems the statute of limitations interposed would constitute a complete bar to the action. Even if it be conceded that some articles were delivered within a period of five years, counsel does not, as we understand him, insist it is such a running account as would withdraw the other items of iron work from the operations of the statute of limitations. The right of recovery is not based upon a running account, nor upon any express contract, but upon an implied contract which counsel insists arose and took the place of the express contract on the 9th day of October, 1871. When the law affords a remedy in case of the partial performance of the contract, it is not upon the original contract, but it is upon the *quantum meruit*, upon an implied promise to pay so much as the material and labor were reasonably worth, when delivered on account as though no contract had ever existed. 1 Gil. 92; 5 Gil. 298. It is plain, if the original agreement was abandoned, on the destruction of the building, in an incomplete state and before plaintiffs had fulfilled their contract, there could be no recovery for what was done, except upon an implied agreement to pay so much as the materials were worth, and evidently the statute of limitations will begin to run from the date of furnishing the materials." Affirmed. WALKER and DICKEY, J.J., dissenting.—*Schello v. McEvan.*

INDICTMENT — DISTRIBUTING OBSCENE LITERATURE—FAILURE TO SET OUT THE OBSCENE MATTER COMPLAINED OF.—This was a prosecution upon an indictment for having in possession and giving away an obscene and indecent pamphlet. A motion was made in the court below to quash the indictment, but was overruled. A trial had resulted in a verdict of guilty, and defendant appeals, and claims that the indictment is defective in not setting out what is claimed to be the obscene matter. On the other hand it is claimed that the indictment is good and entirely sufficient under the 408 section of the criminal code, which provides that an indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. WALKER, J., says: "The 223d section of the criminal code, under which this prosecution is had, is of recent adoption in our State, and has not been previously before us for construction. Whilst the 408th section is broad and comprehensive, a majority of the court are of the opinion that, under this section, it was necessary to set out the supposed obscene matter in the indictment, unless the obscene publication is in the hands of the defendant, or out of the power of the

prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which should be averred in the indictment as an excuse for failure to set out the obscene matter; that whether obscene or not is a question of law and not of fact; that the question is for the court to determine and not for the jury. The English precedents for libel, as well as in most of the States of the Union, require the libelous matter to be stated in full in the indictment, that the court may determine whether the article is libelous. * * * * The practice has generally required more than the mere charge in the language of the statute, that the accused has committed a crime. Whilst mere technicalities should not be indulged to the obstruction of justice, still the courts can never relax them until the accused may be unjustly and oppresively convicted. The accused should be apprised of the nature and cause of the accusation. This is a right secured to him by the constitution." Reversed.—*McNair v. People.*

SUPREME COURT OF WISCONSIN.

February, 1878.

APPEAL—DISMISSAL—DAMAGES.—1. Where the court is satisfied that an appeal, though not prosecuted, was taken in good faith, extra damages or costs will not be awarded. N. W. Mut. L. Ins. Co. v. Irish, 38 Wis. 361. 2. Hereafter appellants in this court will not be allowed to dismiss their appeals, except by consent or upon notice to the respondents. Opinion by RYAN. C. J.—*Loucheine v. Strouse.*

CUTTING AND CARRYING AWAY TIMBER—ACTION ASSIGNABLE—DAMAGES—"MISTAKE."—1. Under the statutes of this State, a cause of action for entering upon land and cutting and carrying away timber therefrom (like every other cause of action for tort, which survives to the personal representative), is assignable, so that the action must be brought in the name of the assignee. 2. Where logs are cut by one person from the lands of another without any legal right, although by mere mistake, they are wrongfully cut, within the meaning of sec. 1, ch. 263, Laws of 4873. 3. The invariable rule of damages in all actions for unlawful cutting, as fixed by the statute, is the highest market value of the logs or timber between the cutting and the trial, unless the defendant, within the time there limited, serve upon plaintiff an affidavit that the cutting was done by mistake, and tender payment as prescribed by law. 4. Whether, where such cutting has been done by one who believed, on reasonable grounds, though erroneously, that he had a license from the owner, this is such a "mistake" as the statute contemplates, is not here determined. Opinion by ORTON, J.—*Webber v. Quaw.*

CHATTEL MORTGAGE—PROVISO ALLOWING MORTGAGEE TO TAKE POSSESSION AND SELL.—1. Where a chattel mortgage provides that the mortgagee may take possession and sell whenever he may deem himself insecure, his rights under that provision do not depend upon his having reasonable ground for deeming himself insecure (Huebner v. Koebke, 42 Wis. 319), nor is such a contract a hard and unconscionable one, especially as the right of possession passes (with the legal title) by the mortgage, in the absence of any agreement to the contrary, and, except as against the parties thereto, the statute makes the mortgage invalid unless the mortgagee takes and retains the possession. 2. By the terms of the chattel mortgage. the mortgagee had the right to take possesion and sell whenever she might deem herself insecure, When about to take possession, she was restrained by an injunction order, which required her to accept additional security tendered by the mortgagor, and also required the mortgagor to make an inventory of the property (which was stock in trade) and pay over a certain part of the proceeds of sale thereof to be applied on his notes to the mortgagee as they became due, etc., and forbade the mortgagee to interfere with the property: *Held*, an unauthorized interference with the mortgagee's rights under the contract. Opinion by COLE, J.—*Cline v. Libby.*

FIRE—EVIDENCE OF NEGLIGENCE — JOINDER OF ACTIONS.—1. In an action for the value of plaintiff's goods destroyed by fire in defendent's warehouse, from defendant's negligence, there was evidence that a kerosene lamp was left burning in defendant's office in said warehouse, at night, after all defendant's agents had left the building; but the evidence was conflicting upon the question whether it originated in the office or in some other part of the building. The jury were instructed that if they should find "that the lamp was left burning, and that the act of leaving it burning was a negligent act, and from that should infer that the burning actually took place from the lamp," they should find for the plaintiff. Again, after an instruction that the burden was on plaintiff to show how this fire occurred, and that it could have been prevented by ordinary care, the court added: "If plaintiff shows an act of negligence liable to lead to the accident, it may afford ground for inferring that negligence was the cause." *Held*, that the instructions were erroneous, as leaving the jury to find from the mere fact that the lamp was negligently left burning, that the building took fire therefrom; and as leaving them free to ignore the evidence tending to show that the fire originated in another part of the building. 2. A cause of action for goods destroyed by fire while in defendant's hands as a carrier, and a cause of action existing at the same time in favor of the same person against the same defendant, for goods destroyed by fire while in such defendant's hands as warehouseman, need not be joined; and a judgment upon one is no bar to a subsequent action on the other. Opinion by LYON, J.—*Kroushage v. C. M. & S. P. R. Co.*

RIPARIAN OWNERS—RIGHT TO CONSTRUCT BOOMS.—1. Riparian owners on navigable rivers may lawfully, until prohibited by statute, construct, in front of their lands, proper booms to aid in floating logs, so as not to violate any public law or obstruct the navigation of the river by any method in which it may be used, or infringe upon the rights of other riparian owners. 44 Wis. 295. 2. Booms of the character described, erected by riparian owners in aid of navigation, through shoal water far enough to reach actually navigable water, are not within the statute (R. S. 1858, ch. 41, sec. 2; R. S. 1878, sec. 1596) which forbids the obstruction of navigable rivers without permission of the legislature. 3. In no case can such riparian owners (though owning on both sides of the stream) without consent of the legislature, maintain booms completely crossing the stream; since this would necessarily more or less obstruct navigation, and be in violation of public law. 4. The right to construct booms and other structures in aid of navigation necessarily implies some intrusion into navigable waters; and the extent of such intrusion depends upon the conditions under which the right is exercised, the extent and uses of navigable water, and the nature and object of the structure itself; but the intrusion must always be in aid, and not to the obstruction of navigation. Opinion by RYAN, C. J.— *Stevens Point Boom Co. v. Reilly.*

VOLUNTARY PAYMENT OF VOID TAX — NEW TRIAL—CONDUCT OF TRIAL.—1. One who voluntarily

pays a void tax with knowledge of the facts rendering it void, can not recover the amount. 2. Where the clerk of a school district fails in any year to file with the town clerk the statement required by sec. 34, ch. 23, R. S. 1858, and amendatory acts (Tay. Stats, 559, § 65), this invalidates the school district tax for that year; the want of such statement as going to the ground work of the tax, may be set up as a defense to an action under sec. 35, ch. 22, Laws of 1859, upon a tax deed based on such tax, without making the deposit required by § 38 of said act, and the making of such deposit (where it is accepted) is a voluntary payment of the tax and charges. 3. In like manner, payment of money to the county clerk to redeem lands from sales for pretended school district taxes void for the reason above stated, is a voluntary payment, even though the county, at the time thereof, may be threatening to issue tax deeds upon such void sales. Marsh v. Supervisors, 42 Wis. 355, distinguished. Opinion by LYON, J.—*State v. Hartman.*

NEW TRIAL — OBSTRUCTING HIGHWAY — EVIDENCE. — 1. A new trial should be granted for misconduct of the jury which had, or may have had, an effect injurious to the moving party. 2. In a penal action for the obstruction of a highway, the evidence upon the question whether the *locus* was a highway was conflicting, and would have supported a verdict either way, and the jury, after retiring, procured, without leave of the court, a map of the county, which had not been put in evidence, and examined and consulted it. On a motion by defendant, after verdict against him, the map was not produced, and no proof was made by plaintiff that it contained nothing which might have misled the jury: *Held* that it was error to deny the motion. Opinion by LYON, J.—*Powell v. Supervisors of St. Croix Co.*

SUPREME COURT OF INDIANA.

November Term, 1878.

GUARDIAN—CONVERSION OF WARD'S MONEY—LIABILITY OF SURETY.—It is the duty of a guardian to loan or otherwise invest the money of his ward, in such a way as to keep it all the time at interest as far as practicable, and to use due care in making such loans or investments. He is not permitted to use such money for his own benefit, or to make any profit out of it for himself. It is their duty to preserve the identity as well as the existence of the fund under their control. If they pay away the money as their own, the trust is practically at an end. Add. on Torts, 1 p. 441; 58 Ind. 472. The investment of the money in his hands by a guardian in his own business, or in the business of others in which he has an interest, as a mere business investment, is a conversion of the money for which he is liable on his bond. If he refunds, or settles with his ward before suit is instituted on his bond, his surety is discharged; otherwise the surety is answerable for his principal. In this case the investment by the guardian, Riley Sanders, of the money of his ward in the business of Sanders & Sons, for the benefit of himself and partners, was a conversion of the money for which he became immediately liable on his bond. Judgment reversed. Opinion by NIBLACK, J.—*State v. Sanders*

QUO WARRANTO—ILLEGAL ACTS OF CITY OFFICIALS.—Informations in the nature of *quo warranto* proceedings are governed by article 44 of the practice act. The cases provided for in section 749 of such act, are the only ones in which such informations may be filed in this State. Under said section, *quo warranto* will not lie against the officers of a city to obtain a judgment, declaring that certain territory is not lawfully within the corporate limits of such city. If the territory is not lawfully within such city, and if the officers thereof have unlawfully performed and claim the right to perform official acts within or over such territory, their acts would be illegal, and an injunction would lie, but not *quo warranto*. 55 Ill. 172; 15 Ohio St. 114; 56 Ind. 521; 31 Iowa 432; 30 Ala. 66; 58 Ind. 480. The views expressed in this opinion are applicable to *quo warranto* informations commenced by the State on the relation of its attorney. Judgment reversed. Opinion by HOWK, C. J. *Stulz v. State.*

PROMISSORY NOTE — REASONABLE ATTORNEY'S FEE.—In a litigated case upon a promissory note providing for the payment of a reasonable attorney's fee, where the amount of the recovery is uncertain, a percentage on such amount is not a reliable criterion for the measurement of a reasonable attorney's fee. The plaintiff in such a case has a right to aver and prove that a reasonable fee would be, without regard to the amount of recovery, any named sum. The burden would be upon the plaintiff to prove that the services of the attorney were reasonably worth the sum named in the complaint; and an admission by the defendant that a certain percentage on the amount of the recovery would be a reasonable attorney's fee, is not such an admission of the allegations of the complaint as would relieve the plaintiff from the burthen of proof. Having the burthen of the issues, the plaintiff would have the right to open and close the case to the jury. Judgment affirmed. Opinion by HOWK, C. J. *Hyatt v. Clements.*

MUNICIPAL CORPORATIONS—PAROL PROOF TO SUSTAIN RECORD.—This was an action by Crockett against the city of Logansport for salary as city attorney. The complaint showed that Crockett was elected city attorney June 1, 1872, to serve one year. The city answered that on January 16, 1873, the city council removed him from the office. At the trial the city offered in evidence a record of the proceedings of the common council of January 16, containing a resolution that the "services of Frank Crockett, lately appointed city attorney, be in the future dispensed with and his pay cease as such from this date," with the word "carried" following, entered by the city clerk. The city then offered to prove, by parol that of the nine members present at the meeting, five (naming them) voted yea upon the resolution, but the court refused to hear the proof. There was judgment for the plaintiff below. PERKINS, J.: The act for the incorporation of cities declares that on the passage or adoption of any by-laws, ordinances or resolutions, the yeas and nays shall be taken and entered of record. The council had the power to remove Crockett. Perhaps such removal might be on motion, without a resolution, but in the case at bar, it was attempted by resolution, so that if the section cited is mandatory, it was necessary that the yeas and nays should be taken and entered of record on its adoption. The section is mandatory, and the court did not err in rejecting the parol evidence offered. Proceedings of public bodies required to be recorded, must, as a general rule, be proved by the record. In the case at bar, the clerk had omitted to record, and of course there was no record to be given in evidence or to be copied. As to whether the city may yet make a *nunc pro tunc* entry of the omitted proceedings, see the cases collected in 1 Dillon on Corp., chap. 11, § 231 *et seq.* (The case was, however, reversed on the ground that the damages awarded were excessive.) *City of Logansport v. Crockett.*

NEGLIGENCE—WILLFUL—CONTRIBUTORY—PLEADING.—This was an action by Thomas Sinclair, administrator, to recover damages for the negligent killing of John Sinclair by the Pennsylvania company's railroad. The complaint contained two paragraphs. The first was in the usual form; the second alleged that the defendant was running a train of cars at a "recklessly

and grossly negligent and dangerous rate of speed," etc. The evidence established contributory negligence on the part of the deceased. The plaintiff had judgment below. NIBLACK, J.: "Negligence is a non-feasance and not a malfeasance. It is an act of omission rather than commission. When an intention to commit the injury exists, whether that intention be actual or constructive only, the wrongful act ceases to be a merely negligent injury, and becomes one of violence or aggression. Shear. and Red. on Neg. § 2; 47 Ind. 471; 17 Wall. 357. When, therefore, the injury complained of is a negligent one, contributory negligence is a good defense to the action. It is only when the injury sued for is alleged, either in terms or in substance, to have been willfully or purposely committed, that contributory negligence ceases to be a defense. As a matter of evidence, proof that the misconduct of the defendant was such as to evince an utter disregard of consequences, or as to imply a willingness to inflict the injury complained of, may tend to establish willfulness on the part of the defendant; but to authorize a recovery on such evidence there must be suitable allegations in the complaint to which it is applicable. 53 Ind. 307. The allegations of the second paragraph of the complaint were not sufficient to justify a recovery over proof of contributory negligence on the part of the deceased. Judgment reversed." *Pennsylvania R. Co. v. Sinclair.*

DISTINCTION BETWEEN PREMIUM AND WAGER.—Action by appellee against appellants to recover the amount of a certain premium offered by the latter under the name of the Indianapolis Trotting Association to the owner of the horse that should make the second best time in a certain trotting match on appellants' track. The plaintiff had judgment below. BIDDLE, J.: "The facts alleged show a sufficient consideration for the premium to maintain the action. It is the same consideration as that offered by way of reward to the public, or to any person who shall do some act, obtain something, or accomplish some purpose which is not unlawful, for the person offering the reward. When the act is done, the thing obtained, or the purpose accomplished, the proposition offering the reward is accepted, and the agreement becomes a contract. The facts alleged in the complaint do not show a wager or bet. There is a clear distinction between a wager or a bet and a premium or reward. In a wager there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who are the parties that must either lose or win. For a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known till after the event. Under our statutes for encouraging agriculture and authorizing public fairs, premiums are offered for the best draft, saddle and trotting horses, etc. These premiums are certainly not wagers. There is no difference in principle between a premium offered by an authorized corporation and one offered by a private partnership. Neither are wagers, nor are they unlawful. Judgment affirmed." *Alvord v. Smith.*

MARRIED WOMAN — EFFECT OF JUDGMENT BY DEFAULT—ESTOPPEL.—This was a suit for partition, brought by Anna M. Heberer and her husband, against Unfried. The said Anna claimed title to an undivided third of certain real estate, as widow of a former husband, Roth, who died in 1864. Anna and three children survived Roth. A mortgage had been foreclo-ed against the real estate in suit in 1866, said Anna having been made a party to the foreclosure suit and been defaulted. She showed in her complaint that she had never joined in the mortgage. The property was purchased by the appellant, Unfried, at sheriff's sale under the decree of foreclosure. The appellee, Anna, had judgment in her favor in the court below. NIBLACK, J.: "Was the appellee, Anna, estopped by the judgment of foreclosure, to which she was a defendant, from setting up her claim as the widow of Roth to the land in controversy? It was not alleged in the foreclosure proceedings that she had joined in the execution of the mortgage, nor that the mortgage was given to secure the purchase money of the mortgaged lands; nor was any other fact stated, tending to negative her claim to such land as widow of the deceased mortgagor. It was not even averred or shown in that complaint that she was the widow of such mortgagor, the only allegation being that she and her children were heirs, etc. A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood. When the said Anna made default in the action of foreclosure, nothing was taken against her as confessed, nor could have been, which was not alleged in the complaint; and as nothing was alleged hostile to her claim as widow, it follows that nothing concerning her claim as such widow was concluded against her by the judgment of foreclosure. 41 Ind. 210; 25 Ind. 458; 17 Mass. 237; Big. Estop. 65. A judgment by default is conclusive of all that is properly alleged in the complaint, and nothing more. Herman Estop. 191; 42 Ill. 319; 46 Ill. 359. A married woman cannot divest her title to real estate by an estoppel in pais. 59 Ind. 143. This rule applies, if possible, with greater force to a married woman under coverture of a second husband as regards lands descended to her as the widow of her first husband, which she is incompetent to convey even with the concurrence of her second husband. 37 Ind. 463; 35 Ind. 341; 59 Ind. 326. Judgment affirmed." *Unfried v. Heberer.*

CORRESPONDENCE.

WAS SHAKSPEARE A GOOD LAWYER?

To the Editor of the Central Law Journal:

In looking over the volumes of the JOURNAL, recently added to my set, I came across an article in the second volume, p. 69, entitled: "Was Shakspeare a Good Lawyer?" This article seems never to have received any reply or criticism in the JOURNAL. The writer argues the negative of the subject he discusses, and concludes therefrom that a lawyer could never have written the plays of Shakspeare, and thus disposes of Bacon's claims. The arguments being so manifestly insufficient to sustain the proposition should not be allowed to remain unanswered.

The first argument is drawn, as are the others, from the "Merchant of Venice," and is, that no lawyer would have represented Balthazer as pronouncing judgment in the case inasmuch as the duke presided at the trial. It nowhere appears that the duke did preside at the trial, but the contrary clearly does, for the duke himself declares before the arrival of the judge:

> Upon my power I may dismiss this court,
> Unless Bellario, a learned doctor,
> Whom I have sent for to determine this,
> Come here to day.

Bellario, being ill, sends in his stead Balthazer, whom he commends to the duke, for that purpose. The duke receives Balthazer cordially, and says:

> You are welcome: *take your place*;
> Are you acquainted with the difference
> That holds this present question in the court?

And Balthazer having taken his place, the duke takes no further part in the proceedings. Balthazer, as judge, examines into the case, and being sufficiently advised, declares the bond forfeit, and pronounces the judgment of the court in favor of Shylock, saying:

> A pound of that same merchant's flesh is thine,
> The court awards it, and the law doth give it.

When a judge is disqualified to try a case he may call an attorney to take his place in the trial of the cause. In such a case, the attorney or judge *pro tem.*, has all the power of the regular judge over, or in, the case. Lerch v. Emmett, 44 Ind. 332: 43 Ind. 64.

The second argument is drawn from these lines, wherein he says:

> Tarry a little: there is something else.
> This bond doth give thee here no jot of blood;

concerning which the writer of the article referred to says the decision contains "a stupid violation of the familiar maxim of law, that when the law granteth anything to any one, that also is granted without which the thing itself can not be." As to this point I submit that the writer misapprehends the effect of the decision and the principle leading to it. The judge himself explains in these words:

> Take then they bond; take thou they pound of flesh;
> But, in the cutting of it, if thou dost shed
> One drop of Christian blood, they lands and goods
> Are, by the laws of Venice, confiscate
> Unto the State of Venice.

The meaning clearly is that, by the laws of Venice, Shylock would forfeit his lands and goods if he were to shed the merchant's blood. The bond was indeed forfeited, but the penalty could not be exacted without a violation of the law, and as the money due on the bond had been refused "in the open court," he could not recover it.

The "familiar maxim of law" referred to by the writer of the article under consideration did not apply, and, therefore, could not have been violated.

The third and concluding argument in the article, in 2 Cent. L. J. 69, is thus forcibly stated by the author: "There is one passage, however, in this court scene, into which none but an ignorant man could have blundered, and which to our mind is conclusive evidence that, unless this play has been garbled, it was not written by Francis Bacon." It is that passage in which Shylock thus addresses the duke:

> I have possessed your grace of what I purpose;
> And by our holy Sabbath I have sworn,
> To have the due and forfeit of my bond:
> If you deny it, let the danger light
> Upon your charter and your city's freedom."

The threat contained in these lines were not of a *forfeiture* of the city's charter, as the writer seems to have thought. Venice had grown wealthy by its policy of protection to aliens, by which they had been induced in great numbers to bring their wealth there. Shylock was a representative of that class, of whose rights the judge had said:

> Of a strange nature is the suit you follow;
> Yet in such rule, that the Venetian law,
> Can not impugn you as you do proceed.

Here, then, was a suitor with a good cause of action, whose suit must be heard if aliens or Jews had rights which Venice would protect.

> If you deny me, fie upon your law,
> There is no force in the decrees of Venice.

If his rights were denied, his people would have no further confidence in the freedom of the city guaranteed them by the city's charter, and would leave a city where they were not secure in the possession of their rights or property. This is the "danger" which would light upon the city's charter, and the conclusion arrived at by the writer of the article referred to was certainly unwarranted by the text.

Whether Shakspeare was a good lawyer or not, the decision of the court in Shylock v. Antonio seems to have been sound.

WILBER L. STONEX.

BOOK NOTICES.

THE LAW OF EXTRADITION, International and Inter-State, with an appendix, containing the Extradition Treaties and Laws of the United States, several sections of the English Extradition Act of 1870, and extradition regulations and forms. By SAMUEL T. SPEAR, D. D. Albany: Weed, Parsons & Co. 1879.

This is, we understand, the first treatise on the law of Extradition ever published in this country. The subject itself has thus far received but slight attention in legal works, for, according to the author, with the exception of two chapters in Hurd on *Habeas Corpus*; a note of nine pages in the sixth volume of Mr. Moaks' English Reports; a few sections in Mr. Wharton's Conflict of Laws, and Criminal Law, and about twenty-five pages in Lewis' United States Criminal Law, the questions discussed in the work before us have received no attention from the law writers, and in these cases have been only incidentally noticed.

Questions of international extradition seldom arise, and when they do, concern, for the most part, only the State departments of the different countries. But questions of inter-State extradition are frequent, and appear to be constantly increasing, and for this reason the treatise before us will very often be referred to. The author is an authority on the subject on which he writes; his articles in the *Albany Law Journal* during the past two years, which form a great portion of the book, attracted much attention, and were widely read. They have now grown into a handsome volume of over 400 pages, with a table of cases and an index. Whoever desires, or finds it necessary, to investigate the questions arising out of extradition between the States, will find this work indispensible. "The extradition cases," the preface states, "of which there is any record, whether international or inter-State, are widely scattered in judicial and other reports; and after finding these cases and examining their leading features, the author has endeavored to arrange them under appropriate heads, so as to present the law on the subject. Such cases are comparatively rare in the ordinary practice of the legal profession, yet when they do occur they may, and sometimes do, involve important questions of law. If this treatise shall furnish any facility for the solution of these questions, it will have gained, at least, one of its ends." An appendix is added to the main body of the work, which contains the full text of all the extradition treaties of the United States now in force, the extradition laws enacted by Congress, several sections of the English Extradition Act of 1870, and extradition regulations and forms, both international and inter-State. These will greatly increase the practical value of the treatise to the legal profession.

The words "ABRIDGMENT OF BLACKSTONE AND PLEADINGS," which appear on the back of a small 32-mo., of 250 pages, compiled by M. E. DUNLAP, and just published by F. H. THOMAS & CO., of this city, fortunately describe the book correctly. We say fortunately, because the title page which describes the book as "a manual of the general principles of law stated in Blackstone and the leading writers on the law of Pleading" is both incorrect and misleading. It seems to be a digest of definitions and rules of law

with large black letters thrown in indiscriminately to catch the eye. We look in vain, however, for "principles," and as there is no index, the student for whom the book seems to be intended, must have a good memory when he desires to read anything for the second time. He will be a poor friend to any beginner in the study of the law who will recommend him to this book, while a second hand copy of Blackstone is to be had at the booksellers'. The only two apologies we ever heard for the publication of a book of this kind, were that it could be "easily carried round" and would be found very useful in a "cram." But until it shall become necessary for the student to exercise his powers of locomotion and study at one and the same time, the first while remaining an essential quality in the case of a watch or pocket pistol, will continue to be useless as a recomendation for a law book. Concerning the second, we can only say that some old time doubts of ours as to the utility of "cramming" have never been satisfactorily removed.——The SOUTHERN QUARTERLY REVIEW, a new magazine, published at Louisville, Kentucky, devotes some space to articles of a legal character, three of which appear in the January number. The most extensive and interesting of these is a paper of twenty pages on the Laws of Louisiana and their Sources, by Hon. E. T. Merrick, formerly Chief Justice of that State. The others discuss the Law of Fraudulent Conveyances, and the Right to Limit Railroad Charges.

QUERIES AND ANSWERS.

[The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to querie will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particluar cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

**** *The following queries received during the past month are respectfu lly submitted to our subscribers for solution, by request of the senders. It is particularly desired that any of ourt readers who have had similar cases, or have investigated the principles on which they depend, will take the trouble to forward an answer to as many of them as they are able.*

10. BANK CHECKS—DONATIO CAUSA MORTIS.—Are ordinary bank checks payable to order or bearer, such an assignment of the funds in bank as to be the subject of gifts *causa mortis?* or are they simply, like the donor's promissory note, a promise to give? X.

11. STATUTE OF LIMITATIONS—COVERTURE—INFANCY.—A right of action accrues to a female infant during the suspension of the statutes of limitation by the war. After the cause of action accrues, and during the suspension of the statutes, she marries, and is still under coverture, when she begins her suit after the war. The statutes of limitation are pleaded against her. Will her coverture, which began after her cause of action accrued but during the suspension of the statutes, defeat the bar of the statutes?

R. & M.

12. THE DEFENDANT RECEIVES a decoy package through the Southern Express Co., believing it to be the fruits of a crime, recently after its commission. Does the same presumption follow as if it were really the fruits of a crime? C.

13. A RAILROAD COMPANY ISSUED its first mortgage bonds, with semi-annual coupons attached. The mortgage provides, among other things, that it is "for the use, benefit and security of the holders of said bonds, all of which are to stand equally secured by said deed of trust, though issued at different times; * * * to be void if said bonds, together with the interest thereon, shall be paid as the same shall become due; * * * and if any bond or coupon shall remain due and unpaid for thirty days, then, etc.; * * * and from such sale to retain the amount due for principal and interest, * * * and to pay said bonds, costs and interest, to the persons lawfully entitled, etc." The original holders clipped off three years' coupons, and sold the bonds to parties who believed the coupons were retired, and not in existence. Afterwards, the company being in default, assignees of coupons cause a foreclosure. The road sold for less than the total debt. Do the coupon holders have any prior right over bondholders, or must they share *pro rata* in the fund? Can any one state a *railroad* case in point? A.

14. UNDER THE PROVISIONS OF A WILL the second item of which is, "I give and bequeath the above de-described property to my children and the heirs of their body, and for their benefit, to revert to my family in case my children die without issue"—is the widow of S.—who was a son of the testator, which son received a house and lot under the will and then died without issue—dowable in said lot? In other words, was S. seized in fee of the house and lot so that his widow was, at his death, entitled to dower? Give authorities holding that she is so entitled. E. J. H.

NOTES.

THE LATE CALEB CUSHING is said to have received $26,000 in legal fees during the last year of his life. ——The failure of Ward & Peloubet, law book publishers, of New York, is announced. They succeeded Diossy & Co. three years ago.——Richard Cooke Tilghman, Chief Justice of the Orphans' Court for Queen Anne County, Maryland, died last week. He was seventy-two years old.——The act recently passed by he legislature of this State prohibiting the licensing or taxing by a municipal corporation of certain professions, among them the legal profession, contains an emergency clause, and, consequently, became law on the 6th inst. The first section is as follows: "Hereafter no person following for a livelihood the profession or calling of minister of the gospel, teacher, professor in a college, priest, lawyer or doctor of medicine, in this State, shall be taxed or made liable to pay any municipal or other corporation in this State any tax or license of any description whatever for the privilege of following or carrying on such profession or calling, any law, ordinance or charter to the contrary notwithstanding."——In a recent English case a bookseller applied to the court to commit a barrister for non-payment of an account. The evidence of means was that the defendant had chambers, and had gone on circuit. The judge said if a grocer or butcher, or ordinary tradesman, put up his name over his shop, the Queen's Bench Division of the High Court of Justice had decided that he was carrying on business, which was *prima facie* evidence of means. In the case of a barrister the difficulty arose that the law compelled him to do any amount of work for no remuneration; and, therefore, how could he (the judge) say there was evidence of means? The defendant might have received no fees, although in practice. True, a barrister could not well be expected to have no money if he could go the circuit; but still he did not consider that sufficient evidence of means. He refused to commit.